

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

V.

and

Docket No. 1,063,008

ORDER

Respondent and insurance carrier (respondent) request review of the December 18, 2015, Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral arguments on April 14, 2016.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Thomas G. Munsell, of Kansas City, Missouri, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the entire record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant sustained a 23 percent permanent functional impairment to the whole body, and a 56.75 percent work disability, comprised of a 43 percent wage loss and a 70.5 percent task loss.¹ The ALJ ordered respondent to pay all claimant's unpaid medical expenses as authorized treatment.

Respondent contends claimant has no task loss because he has no permanent restrictions in a clean air environment. If the Board finds claimant sustained a task loss, respondent maintains only Dr. Barkman's task loss opinion is valid because Dr. Koprivica

¹ The parties stipulated claimant's wage loss is 43 percent.

imposed no permanent restrictions. Respondent also argues the ALJ erred in giving equal weight to Dr. Koprivica's impairment rating because the doctor did not perform pulmonary function testing required by the *AMA Guides*.² Respondent contends medical bills from Neosho Memorial Regional Medical Center and Chanute Radiology are unauthorized because claimant sought that treatment when respondent was providing authorized treatment with Dr. Barkman. Respondent disputes a St. Luke's Health Systems medical bill because the record contains no evidence the bill exists or that the bill relates to claimant's work injury.

Claimant argues the opinions of Drs. Barkman and Koprivica that claimant sustained a 100 percent task loss are undisputed. Claimant claims the ALJ erred in finding an 8 percent task loss. Claimant requests the Board modify the Award to reflect the stipulated 43 percent wage loss, averaged with a 100 percent task loss, for a 71.5 percent work disability. Claimant argues Dr. Koprivica's opinions are entitled to greater weight because Dr. Barkman's rating was based on claimant's condition on a good day when he was taking medication. Claimant contends his outstanding medical bills were regular hearing exhibits admitted into evidence without objection, and respondent should not now be allowed to challenge its obligation to pay the bills. Claimant requests the Board assess interest against respondent, pursuant to K.S.A. 44-512b, for its failure to pay permanent partial disability benefits (PPD) before the Award was entered.

The issues are:

1. What is the nature and extent of claimant's disability, including functional impairment and work disability?
2. Is respondent obligated to pay medical bills for treatment claimant received when respondent was providing authorized treatment with Dr. Barkman?
3. Is respondent obligated to pay a medical bill when claimant presented no evidence the bill existed or the treatment was related to his injury?
4. Is claimant entitled to interest pursuant to K.S.A. 44-512b?

FINDINGS OF FACT

Claimant is 50 years old and was hired by respondent as a truck driver on May 16, 2012. Claimant transported pulverized bulk cement from Ash Grove Cement Company to customers. His duties continuously exposed him to cement dust.

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

Toward the end of June 2012, claimant developed a cough and sore throat. As he continued to perform his duties, his cough worsened and he developed difficulty breathing. On September 28, 2012, claimant saw Dr. Vernon Parham, his wife's physician, who diagnosed reactive airway disease and occupational asthma. The doctor provided claimant with an Albuterol inhaler, prescribed medication, and recommended additional testing, including a spirometry test and a CT scan.

On Saturday, September 29, 2012, claimant gave respondent an off work slip he received from Dr. Parham. Claimant explained Dr. Parham took him off work because he was exposed to cement dust. Claimant returned to work on October 1, 2012, but he continued experiencing coughing and difficulty breathing.

Claimant saw respondent's company doctor, Dr. Gregory Mears, on October 8, 2012. Dr. Mears prescribed medication and instructed claimant to avoid exposure to cement dust. The doctor diagnosed a chronic cough and a sore throat. Dr. Mears recommended claimant have a CT scan of his chest and pulmonary function testing. Dr. Mears returned claimant to work on October 10, 2012, with restrictions to avoid cement dust.

Respondent considered claimant to have voluntarily resigned, and his last day working for respondent was October 11, 2012. Claimant's symptoms continued, but thereafter improved a little.

Claimant attempted to fill prescriptions from Drs. Mears and Parham, but respondent would not authorize the purchases. Claimant contacted respondent's adjuster to request authorization of his prescriptions. However, claimant was still unable to get them filled. Claimant received a letter from the adjuster indicating his claim was being investigated and had not been accepted.

Dr. Parham referred claimant to Dr. Monisha Das, a pulmonary specialist at St. Luke's Health Systems in Kansas City. Claimant saw Dr. Das on November 30, 2012. Dr. Das found claimant had a cough, difficulty breathing, obesity, occupational asthma, nonspecific abnormal findings on the pulmonary function test, and new onset asthma, secondary to cement exposure from his workplace. Dr. Das also found claimant had moderate obstructive and restrictive lung disease, with significant bronchodilator response, which Dr. Das felt reinforced her diagnostic findings. In Dr. Das' opinion, claimant's mild restrictive lung disease was secondary to obesity. Dr. Das recommended claimant continue with Advair and Albuterol, return to work, and lose weight. Claimant was instructed to return to Dr. Das on March 6, 2013.

On March 11, 2013, claimant received treatment from the emergency department of Neosho Memorial Regional Medical Center and Chanute Radiology. The medical bills for that treatment were placed into evidence without objection.³

Following a preliminary hearing on December 12, 2012, the ALJ ordered respondent to provide treatment. Pursuant to that order, respondent authorized Harold W. Barkman, M.D., a physician board certified in internal and pulmonary medicine, who saw claimant on February 20, 2013.⁴ Dr. Barkman advised claimant he could try to work. In January 2014, he worked for KLM Transport for two months as a lease operator truck driver. Claimant earned \$400 for training, then around \$1,200 per week. Claimant experienced breathing difficulties and developed pneumonia. Claimant quit working for KLM because he felt it was unsafe to drive a truck when he was sick. After claimant developed pneumonia, respondent stopped paying for his medication.

Dr. Barkman diagnosed reactive airway disease, an asthma-like condition, secondary to Portland cement and DuraPos⁵ exposure.

Dr. Barkman recommended avoidance of things that aggravated the patient's cough and shortness of breath. The doctor prescribed bronchodilators and medication to suppress claimant's immune response to irritants. Dr. Barkman testified claimant improved with treatment. Dr. Barkman testified claimant's reactive airway disease was caused by his work injury at respondent, and the accident was the prevailing factor causing his injury, need for treatment and disability.

Dr. Barkman imposed permanent restrictions to avoid environments that aggravate his illness, including cold air, environmental dust, diesel fumes and cement dust. Dr. Barkman recommended the use of medication and the monitoring of his pulmonary function. Dr. Barkman also restricted claimant from driving trucks.

Dr. Barkman rated claimant's permanent functional impairment under the AMA *Guides* at 9 percent of the whole body. In rating claimant's impairment, Dr. Barkman considered the medications claimant required for normal functioning. The doctor's 9 percent rating is based on claimant's condition when he was taking medication. The doctor did not know what his rating would be if claimant was not taking medication.

Dr. Barkman reviewed the report of vocational expert Karen Terrill that identified and described the 17 work tasks claimant performed in the five year period before his injury.

³ Claimant's Depo. at 35.

⁴ There is evidence indicating Dr. Barkman's first visit with claimant was on January 18, 2013, but there is no record of any such visit.

⁵ The specific identity of this product is not in the record.

Dr. Barkman determined claimant was unable to perform any of the 17 tasks. Dr. Barkman testified:

Q. All right. So it appears to me you have disallowed all of the 17 job tasks identified.

A. Correct.

Q. All right. And if I were to ask you to assume that all of these 17 tasks could be offered to him in what I'll call a clean air environment, would any of your responses be the same?⁶

...

MR. PHALEN: Let me interpose an objection. It calls for speculation, it's a vague and ambiguous question, and assumes facts that are not in evidence nor will intended to be offered in evidence.

Q. (By Mr. Clinkenbeard) You can go ahead and answer.

A. Yes.

Q. Okay. Let's go back through it then. With my assumption that these tasks could be offered in a clean air environment, could you identify with an "O" what he could do?

A. The definition of clean air becomes important here. And from your view what does it -- I guess I can't ask you questions but I struggle a little bit with that because -- because of the disease he has.

Q. Okay. Let's work with this definition then. You've mentioned that he has responses to certain irritants.

A. Right.

Q. If he can be offered work environments that don't include or expose him to the irritants he's already presented to you as being injurious to him, which of these job tasks could he go ahead and perform? Does that make sense?

A. Right. I guess from my view it's a little hard to forecast what environment he can be in until he's in it.

Q. Right.

⁶ Barkman Depo. at 12.

A. I mean, an example being, say, he was driving a propane truck as opposed to a diesel. Can he tolerate that? I don't know, he's not tried it. But that's a cleaner environment, that's all I'm saying.

. . .

A. Right, when he's -- when his symptoms are controlled, he should be able to do these things. Now he hasn't done them in a long time but bottom line --

Q. Physically he's able to perform --

A. Should be able to.⁷

. . .

Q. . . . So if I counted correctly, when asked about what this man was physically capable of performing out of 17 job tasks, you reduced your prohibited activities to three?

A. I believe so.

Q. All right. So would it be fair to say that this man can physically perform 14 of the 17 job tasks if offered in a suitable environment?

A. Correct.⁸

Dr. Barkman testified claimant ran out of his medication and was having trouble getting his prescriptions renewed. The doctor testified claimant's need for all of the medications is the result of his work at respondent.

Claimant worked for Schneider National from August to October 2014. He drove a box van, delivering merchandise from the J.C. Penney warehouse in Lenexa to stores. The heat and the fumes from the trucks increased his breathing problems, and he quit because he could no longer perform the job. He averaged \$600 per week at Schneider, with fringe benefits.

Claimant returned to work at KLM Transportation as a lease operator from November to December 2014. Claimant again experienced difficulty breathing and was again diagnosed with pneumonia. He then worked for Urban Metals, tearing down a warehouse of old pallet racking. Claimant made \$10 per hour and worked 40 hours per

⁷ Barkman Depo. at 13-15.

⁸ Barkman Depo. at 16.

week from February 1 to the middle of March 2015. Claimant has not worked since March 2015.

Respondent again cut off claimant's medication, despite the opinion of the authorized treating physician, Dr. Barkman, that claimant's need for medication was caused by his work injury. Dr. Barkman embodied that opinion in a letter to respondent, but respondent continued to refuse paying for the medication.

Claimant continues to experience trouble breathing, coughing and fatigue. Claimant sees Dr. Barkman every three months. He uses multiple inhalers and takes a number of prescription medications.

P. Brent Koprivica, M.D., a board certified occupational medicine physician, evaluated claimant on February 26, 2014, at the request of claimant's counsel. The doctor reviewed medical records, took a history and performed a physical examination.

Dr. Koprivica diagnosed reactive airway disease based on exposures to cement dust at work. Dr. Koprivica testified claimant's occupational exposures to cement dust were the prevailing factor in causing his reactive airway disease, need for treatment and resulting impairment and disability.

Using the *AMA Guides*, Table VIII, on page 162,⁹ Dr. Koprivica opined claimant had a Class 3 respiratory impairment of 35 percent to the whole person. Dr. Koprivica felt the rating was a fair reflection of the impact from claimant's occupational exposure, airways disease and ability to do activities of daily living.

In Dr. Koprivica's opinion, claimant needs to be evaluated periodically to monitor his medications. Claimant will require future lifelong medical treatment, and he may require hospitalization. The specifics of future treatment are not predictable, and claimant will experience temporary exacerbations of his underlying condition for the rest of his life.

Dr. Koprivica reviewed the task list prepared by Karen Terrill and opined claimant is unable to perform all 17 tasks, for a 100 percent task loss.

Dr. Koprivica did not test claimant's pulmonary function because the patient was acutely ill when the doctor saw him. Under the circumstances, Dr. Koprivica did not want to put claimant through the testing. The doctor instead reviewed the treatment records, which contained reports of previous pulmonary function studies. Dr. Koprivica testified it would be reasonable to test claimant once his acute illness resolved. The doctor opined

⁹ The only part of the *AMA Guides* offered into evidence was page 162, which was attached to Dr. Koprivica's report.

when claimant is being treated for his pulmonary disease and is not exposed to irritants, he still has reduced exercise capacity despite being otherwise asymptomatic.

Dr. Koprivica's report states:

Because of his acute illness and stated difficulties with the spirometry testing with Dr. Barkman, I chose not to repeat those studies and rely on the more stable studies that are available during prior care and treatment.¹⁰

Dr. Koprivica testified claimant's restrictive disease and inability to fully expand his lungs relate to his obesity, which is unrelated to his occupational exposures.

PRINCIPLES OF LAW AND ANALYSIS

Functional Impairment

There are two impairment ratings in the record: Dr. Barkman's 9 percent to the body and Dr. Koprivica's 35 percent to the body. No party argues that either physician is unqualified to rate claimant's permanent functional impairment. Both doctors based their ratings on the *AMA Guides*. The Board accords equal weight to both ratings, and finds claimant's permanent functional impairment is 22 percent to the whole body.

Respondent contends Dr. Koprivica's rating is inconsistent with the requirement of the *Guides* that the doctor must perform a pulmonary function test at the time of his examination. There are two fallacies in respondent's position:

1. The *Guides* may require pulmonary function studies be administered at the time of a physician's examination, but the single page of the *AMA Guides* in the record says nothing about such a requirement. The burden is on the party relying on the *AMA Guides* to include in the record that portion of the *Guides* upon which reliance is made.¹¹ Moreover, at oral arguments, the parties clearly did not agree that the Board could independently consult the *Guides*.

2. Dr. Koprivica testified he did not perform a pulmonary function test on the date of his examination because claimant was ill with what appears to be breathing difficulties or perhaps pneumonia. The doctor reasonably chose not to perform such a test under the circumstances, particularly when the medical records the doctor reviewed contained reports of previous pulmonary studies conducted when claimant's condition was more stable.

¹⁰ Koprivica Depo., Ex. 2 at 13.

¹¹ *Durham v. Cessna*, 24 Kan. App. 2d 334, 945 P.2d 8 (1997).

Work Disability

The Board finds claimant's work disability is 71.5 percent, predicated on a wage loss of 43 percent and a task loss of 100 percent. Dr. Koprivica testified claimant lost the ability to perform all of the 17 work tasks identified and described by Ms. Terrill. When initially presented with the question of task loss, Dr. Barkman opined claimant was not capable of performing all of the work tasks on Ms. Terrill's list.

But, based on the testimony quoted above, respondent argues Dr. Barkman changed his task loss opinion from 100 percent to 17.5 percent.¹² However, the doctor did not change his opinion. The doctor's testimony on cross-examination addresses what claimant's task loss would be if the tasks could be performed in "a clean environment." The proper and relevant question is not what claimant's task loss would be if the nature of his previous tasks is altered. The question is claimant's loss of the ability to perform the work tasks as they existed.

Respondent maintains claimant had no task loss because Dr. Koprivica imposed no permanent restrictions. That argument fails because both Dr. Koprivica and Dr. Barkman concluded claimant could perform none of the work tasks identified by Ms. Terrill, the only vocational expert providing evidence. Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive.¹³

Medical Bills

Respondent claims the ALJ erred in ordering it to pay all outstanding medical bills as authorized treatment. Respondent maintains it should not be ordered to pay the Neosho Hospital and Chanute Radiology invoices because the treatment resulting in the bills was received after claimant began authorized treatment with Dr. Barkman. The bills relate to emergency room care claimant received on March 11, 2013. Although claimant's treatment with Dr. Barkman commenced before claimant's emergency room treatment, respondent's position on this issue must be viewed in light of its repeated refusal to pay for treatment, including authorized treatment from the company physician, Dr. Mears, and from Dr. Barkman, who was authorized by order of the ALJ. These refusals occurred in an admittedly compensable claim. In the Award, Judge Moore noted:

Throughout the pendency of this claim, Morales has encountered difficulties with Sparta Insurance Company's adjustors[,] who have repeatedly refused to authorize prescriptions or pay medical bills. The medical expenses incurred with Dr. Barkman at Kansas University Medical Center and Neosho Memorial Regional Medical

¹² The Award incorrectly indicates Dr. Barkman's revised task loss opinion was 8 percent.

¹³ *Demars v. Rickel Mfg. Corp.*, 223 Kan. 374, 573 P.2d 1036 (1978).

Center, along with medical mileage to and from treatment at those institutions, remain unpaid. Morales has often had to live without his medication, as Sparta refused to pay for prescriptions.

The outstanding bills were offered into evidence by claimant's counsel without objection. Under the circumstances, the Board adopts the findings of the ALJ on this issue.

Respondent also disputes its responsibility to pay a bill of St. Luke's Health Systems. There is not an itemized invoice in the record, however, there is no dispute that claimant received treatment from Dr. Das, the only medical provider claimant saw associated with St. Luke's. Respondent is entitled to an itemization of the charges and invoice(s) of such charges shall be submitted by claimant's attorney to respondent's counsel for payment, subject to the fee schedule, if the treatment received by claimant related to his respiratory injuries in this claim.

Claimant requests the Board assess interest against respondent for its failure to pay compensation before the Award was entered. This issue was not raised to the ALJ and accordingly the Board will not address the issue. The Board generally will not address issues raised for the first time on appeal.¹⁴

CONCLUSIONS

1. Claimant's functional impairment is 22 percent to the body, and he is entitled to PPD based on his work disability of 71.5 percent.

2. Subject to the Kansas medical fee schedule, respondent shall pay \$1,475.75 and \$361.70 to Neosho Memorial Regional Medical Center and \$35.00 to Chanute Radiology.

3. As detailed above, subject to the Kansas medical fee schedule, respondent shall pay \$292.00 to St. Luke's Health Systems upon presentation of an itemized statement by claimant's counsel to respondent's counsel.

4. Because the issue was not raised to the ALJ, the Board will not address claimant's request for interest pursuant to K.S.A. 44-512b.

AWARD

Claimant is entitled to 47.00 weeks of temporary total disability compensation at the rate of \$468.24 per week or \$22,007.28, followed by permanent partial disability

¹⁴ *Tackett v. ABM Industries, Inc.*, No. 1,052,155, 2012 WL 5461461 (Kan. WCAB Oct. 1, 2012).

compensation at the rate of \$468.24 per week not to exceed \$130,000, for a 71.50% work disability.

As of May 25, 2016, there is due and owing to the claimant 47.00 weeks of temporary total disability compensation at the rate of \$468.24 per week in the sum of \$22,007.28, plus 144.29 weeks of permanent partial disability compensation at the rate of \$468.24 per week in the sum of \$67,562.35, for a total due and owing of \$89,569.63, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$40,430.37 shall be paid at the rate of \$468.24 per week until fully paid or until further order from the Director.

WHEREFORE, the Board orders that the Award of Administrative Law Judge Bruce E. Moore dated December 18, 2015, is affirmed as modified.

IT IS SO ORDERED.

Dated this _____ day of May, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
wlp@wlphalen.com

Thomas G. Munsell, Attorney for Respondent and its Insurance Carrier
tmunsell@mwklaw.com
ahancock@mwklaw.com

Honorable Bruce E. Moore, Administrative Law Judge